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## Article

### Abstention: The Unexpected Power of Withholding Your Vote

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*This Article examines the effect of abstentions on the outcome of votes. Scholars (and voters) operate under two basic assumptions about the nature of abstention. First, they assume that an abstention affects all alternatives in equal measure. Second, and relatedly, people assume that a voter's preferred alternative will be less likely to win if that voter abstains (and, of course, more likely to win if she votes). Removing the potential full support of a vote and replacing it with the fifty-fifty proposition of an abstention should hurt the chances of a voter's preferred alternative. These two assumptions guide the thinking on abstentions at all levels of democratic decision-making, and have been incorporated into everything from voting procedures themselves to conflict of interest rules.*

*The thesis of this Article is that these fundamental assumptions about abstention are often false. Initially, there are many potential situations, which fall under a phenomenon known as the "No-Show Paradox," where voters help their favored alternative by withholding their vote. More importantly, there are many situations in which abstention does not express something like fifty-fifty indifference with respect to outcome. Instead, under many voting procedures in a wide range of democratic institutions, abstention places a thumb on the scale for (or against) one of the alternatives. Together, these findings challenge our basic assumptions about abstention and undercut the justification for many of the voting procedures in our most significant democratic institutions, from Congress to courts and corporations to unions.*

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# Abstention: The Unexpected Power of Withholding Your Vote

GRANT M. HAYDEN\*

## I. INTRODUCTION

Democratic institutions make their most significant decisions by voting on them. The public elects representatives at the federal, state, and local level, who, in turn, use voting procedures to pass laws and ordinances. People participate more directly in the lawmaking process through votes on initiative, referendum, or recall votes. Higher courts (and some lower ones) with multiple judges typically resolve their cases through votes. Stockholders elect corporate board members, who then vote on firm decisions. Employees decide whether they want union representation by voting on it, and then do the same to elect union officers, approve contracts, and authorize strikes. Countless numbers of other organizations—from charities to universities to private clubs—employ voting procedures to make their most important decisions.

Most of these democratic institutions, however, also allow people to *abstain*—to withhold their vote. In some cases, people abstain when they are indifferent among the electoral choices, or when they judge the benefits of voting to be outweighed by the costs. In other cases—when, for example, a potential voter has a conflict of interest—an institution may actually compel one of its members to abstain as a kind of “forced” indifference on the matter. The underlying assumption in both of these cases is that abstention, unlike voting, is neutral with respect to the outcome. But while the contours of the right to vote have been the subject of a tremendous amount of scholarship across many disciplines, abstention, despite its obvious connection to the right to vote, has been almost completely ignored.

Instead, most scholars—and voters—make a couple of basic assumptions about the nature and effect of abstention. First, they assume that an abstention affects all alternatives in equal measure. If, for example, a legislature is voting on a proposition, it is widely thought that an abstention always has the effect of distributing the abstaining member’s

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voting power fifty-fifty for and against passage. This, of course, is consistent with the view that, all things being equal, abstentions are neutral with respect to outcome. Second, and related, people assume that a voter's preferred alternative will be less likely to win if that voter abstains and, of course, more likely to win if she votes. Removing the potential full support of a vote and replacing it with the fifty-fifty proposition of an abstention should hurt the chances of a voter's preferred alternative. These two assumptions guide the thinking on abstentions at all levels of democratic decision-making, and have been incorporated into everything from the voting procedures themselves to conflict of interest rules.

The thesis of this Article is that these fundamental assumptions about abstention are false. The first part of the Article defines abstention and fleshes out some of the scholarly work on what motivates the decision to abstain in both large elections and smaller parliamentary bodies. The second part of the Article makes use of rational choice and voting power theory to demonstrate that the basic assumptions about abstention are misguided. Initially, there are many potential situations, which fall under what's known as the "No-Show Paradox," where voters help their favored alternative by withholding their vote. More important, there are many situations in which abstention does not express something like fifty-fifty indifference with respect to outcome. Instead, under many voting procedures in a wide range of democratic institutions, abstention places a thumb on the scale for (or against) one of the alternatives. Together, these findings both challenge our basic assumptions about abstention and undercut the justification for many of the voting procedures in our most significant democratic institutions.

## II. BACKGROUND

### A. *Abstention Defined*

Abstention is a term in election procedure for when an eligible voter refrains from voting. It may occur in the context of a public vote designed to select among candidates for political office, or to pass judgment on an official proposition. In such cases, abstention usually describes what occurs when a voter does not go to the polls on election day.<sup>1</sup> Abstention

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<sup>1</sup> Abstentions in larger public elections may also include voters who show up at the polls and fail to cast a vote for one of the alternatives on the ballot. This may occur when one casts an incomplete ballot, which most frequently occurs with elections for offices further down the ballot in a process called "roll-off." See Peter Brien, *Voter Pamphlets: The Next Best Step in Election Reform*, 28 J. LEGIS. 87, 107-10 (2002) (discussing possible causes of, and remedies for, voter roll-off); R. Darcy & Anne Schneider, *Confusing Ballots, Roll-Off, and the Black Vote*, 42 W. POL. Q. 347, 348 (1989) ("Roll-off" measures the tendency of the electorate to vote for 'prestige' offices but not for lower offices on the same ballot and at the same election."). It may also occur as an act of protest. See *infra* notes 29-33 and accompanying text.

may also occur in the context of a smaller decision-making body such as a legislature, court, board, or law school faculty. In these cases, abstention is often a more affirmative act, describing what happens when a member shows up, and thus counts for the purposes of achieving a quorum, but then refuses to cast a ballot or, under some procedures, votes “present” or “abstention” (refusing to vote “yes” or “no”).<sup>2</sup> Of course, abstention may also occur in legislatures when a member fails to show up, thus failing to count for purposes of a quorum as well.<sup>3</sup> But whether the vote is a large public election or a small decision-making body, abstention simply describes the failure to vote for one of the alternatives.

### B. *Why Do People Abstain?*

So why, exactly, do eligible voters abstain? Several of the primary theoretical tools for analyzing voting systems pay little attention to this question. Social choice theory, as originally developed by Kenneth Arrow and Duncan Black and carried forward by legions of other scholars,<sup>4</sup> gives little attention to the decision *not* to vote.<sup>5</sup> Most of their theoretical work, while formally elegant and quite powerful, operates under the assumption that individual preference profiles, which may include both preference and indifference relations, are actually input into a social choice function to produce a social choice.<sup>6</sup> In other words, they usually assume that people vote to express their preferences. Similarly, voting power theorists, with a few recent exceptions,<sup>7</sup> have spent very little of their energy on abstention,

<sup>2</sup> President Barack Obama faced criticism during the presidential campaign for his “present” votes in the Illinois Senate. See Raymond Hernandez & Christopher Drew, *It's Not Just 'Ayes' and 'Nays': Obama's Votes in Illinois Echo*, N.Y. TIMES, Dec. 20, 2007, at A1.

<sup>3</sup> Indeed, the European Parliament eliminated its Friday sessions because too few members showed up. See Abdul G. Noury, *Abstention in Daylight: Strategic Calculus of Voting in the European Parliament*, 121 PUB. CHOICE 179, 200 (2004).

<sup>4</sup> Some of the foundational works in modern social choice theory are KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1966) and DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958). For a recent summary of the state of social choice theory and Arrow's theorem, see 1 HANDBOOK OF SOCIAL CHOICE AND WELFARE (Kenneth J. Arrow et al. eds., 2002). Social choice theory has come into the legal literature mainly in the guise of public choice theory. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (Maxwell L. Stearns ed., 1997).

<sup>5</sup> Gerald Garvey, *The Theory of Party Equilibrium*, 60 AM. POL. SCI. REV. 29, 29 (1966) (“[W]hile Duncan Black's *Theory of Committees and Elections* and Kenneth Arrow's *Social Choice and Individual Values* are characterized by a most impressive formal elegance, it is also true that neither makes provision for nonvoting.”).

<sup>6</sup> See generally ARROW, *supra* note 4; BLACK, *supra* note 4; see also NORMAN FROHLICH & JOE A. OPPENHEIMER, MODERN POLITICAL ECONOMY (1978); PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION (1986); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982).

<sup>7</sup> See, e.g., DAN S. FELSENTHAL & MOSHÉ MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS AND PARADOXES 279–93 (1998); Matthew Braham & Frank Steffen, *Voting Power in Games with Abstentions*, in POWER AND FAIRNESS 333 (Manfred J. Holler et

choosing instead to focus on the measurement of voting power after the initial decision is made to cast a ballot.<sup>8</sup>

Most of the work done in answering the question why voters abstain comes out of the theoretical framework of rational choice theory. Anthony Downs, in his classic work, *An Economic Theory of Democracy*, set the stage by describing the individual decision to vote or abstain in terms of an expected utility calculation.<sup>9</sup> For Downs, the basic formula looked like this:  $R = PB - C$ , where  $R$  is the expected utility from voting;  $P$  is the probability that an individual's vote will be decisive;  $B$  is the benefit, the stream of utility that flows from the successful election of the chosen alternative or candidate; and  $C$  is the cost of voting.<sup>10</sup> If  $R$  ends up positive, then the individual votes; if not, she abstains.<sup>11</sup> Downs's formula thus promised to give social scientists a useful tool to explain and predict voting behavior.

This formula, though, immediately gave rise to an issue regarding voter turnout. But it wasn't the more familiar issue of explaining low (and falling) voter turnout, but its opposite—why people bother to vote at all.<sup>12</sup> In most applications of the formula, especially in large elections, the probability of casting the deciding vote is infinitesimally small. This drives the value of  $PB$  down toward zero, and it is thus outweighed by even the slightest cost to voting. The basic formula, then, predicts that most instrumentally rational people will rarely, if ever, take the time to vote.<sup>13</sup> This is, of course, at odds with the fact that millions of people regularly show up at the polls. Thus, the issue of voter turnout was that far too many people vote than can be explained by Downs's formula. This led

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al. eds., 2002); Dan S. Felsenthal & Moshé Machover, *Models and Reality: The Curious Case of the Absent Abstention*, in *POWER INDICES AND COALITION FORMATION* 87, 88–92 (Manfred J. Holler & Guillermo Owen eds., 2001); Dan S. Felsenthal & Moshé Machover, *Ternary Voting Games*, 26 INT'L J. GAME THEORY 335, 335–36 (1997); Josep Freixas & William S. Zwicker, *Weighted Voting, Abstention, and Multiple Levels of Approval*, 21 SOC. CHOICE & WELFARE 399, 400–01 (2003); Ines Lindner, *A Special Case of Penrose's Limit Theorem When Abstention Is Allowed*, 64 THEORY & DECISION 495, 496–97 (2008).

<sup>8</sup> A few years ago, Moshé Machover noted that a study of abstentions was “a very young and as yet under-developed part of the theory of voting power.” Moshé Machover, *Comment on Matthew Braham and Frank Steffen, Voting Power in Games with Abstentions*, in *POWER AND FAIRNESS*, *supra* note 7, at 349, 349.

<sup>9</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 36 (1957).

<sup>10</sup> *Id.* at 36–50, 260–76; William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25–26 (1968).

<sup>11</sup> DOWNS, *supra* note 9, at 265–76; Riker & Ordeshook, *supra* note 10, at 25. Downs takes account of party preferences as well, but the basic calculation is the same. DOWNS, *supra* note 9, at 265–76.

<sup>12</sup> See John A. Ferejohn & Morris P. Fiorina, *The Paradox of Not Voting: A Decision Theoretic Analysis*, 68 AM. POL. SCI. REV. 525, 525 (1974); Riker & Ordeshook, *supra* note 10, at 26. Downs himself left this mystery to others to figure out. DOWNS, *supra* note 9, at 260–76. Others, like Gordon Tullock, popularized the idea that voting was irrational. GORDON TULLOCK, *TOWARD A MATHEMATICS OF POLITICS* 108–10 (1967).

<sup>13</sup> TULLOCK, *supra* note 12, at 110.

to much consternation in the rational choice field, eventually leading Bernard Grofman to pose the question whether turnout was the “paradox that ate rational choice theory.”<sup>14</sup>

The fact that people vote in large numbers either meant that many people were acting irrationally or that there was something wrong with the formula. Suspecting the latter, William Riker and Peter Ordeshook reworked the formula into its present form by adding a term, *D*, intended to capture the benefits to voting unrelated to being decisive to the outcome.<sup>15</sup> The calculation now looks like this:  $R = PB - C + D$ .<sup>16</sup> The noninstrumental benefits of voting captured by the *D* term include such things as “the satisfaction from compliance with the ethic of voting, . . . affirming allegiance to the political system, . . . affirming a partisan preference . . .”<sup>17</sup> and other benefits sometimes described as fulfilling a “sense of citizen duty”<sup>18</sup> (or, less formally, as getting “a big bang out of pulling the lever”).<sup>19</sup> With the addition of the *D* term, most of the focus on voting behavior has shifted away from the negligible *PB* term to the *C* and *D* terms—the noninstrumental parts of the equation that appear to drive most decisions to vote or abstain.

This basic rational choice theory formulation gets applied in two bodies of empirical literature that answer the question why people vote—one for large public elections, and one for smaller legislative bodies. The scholarship on people’s decisions to vote (or not) in public elections is quite extensive, encompassing studies that examine the causes of voter turnout in large numbers of elections.<sup>20</sup> The decision to vote in legislative bodies, on the other hand, has not attracted the same degree of scholarly attention: while there are many studies of legislative voting, the overwhelming majority of them limit their examination to yes and no votes, and put abstentions to the side.<sup>21</sup> Indeed, there are only a handful of

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<sup>14</sup> His answer was “no.” See generally Bernard Grofman, *Is Turnout the Paradox That Ate Rational Choice Theory*, in INFORMATION, PARTICIPATION, AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE 93, 93–103 (Bernard Grofman ed., 1993).

<sup>15</sup> Riker & Ordeshook, *supra* note 10, at 25–28.

<sup>16</sup> *Id.* at 28.

<sup>17</sup> *Id.*

<sup>18</sup> Ferejohn & Fiorina, *supra* note 12, at 525. Downs briefly discussed such noninstrumental factors but strictly limited his model to political and economic ends. DOWNS, *supra* note 9, at 274–76.

<sup>19</sup> Ferejohn & Fiorina, *supra* note 12, at 526.

<sup>20</sup> See, e.g., RICHARD G. NIEMI & HERBERT F. WEISBERG, CONTROVERSIES IN VOTING BEHAVIOR 22 (2001); FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON’T VOTE 16–21 (1988); RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER 1–4, 11–13 (1992) [hereinafter TEIXEIRA, DISAPPEARING AMERICAN VOTER]; RUY A. TEIXEIRA, WHY AMERICANS DON’T VOTE: TURNOUT DECLINE IN THE UNITED STATES 1960–1984, at 27–34 (1987) [hereinafter TEIXEIRA, TURNOUT DECLINE]; William Crotty, *Political Participation: Mapping the Terrain*, in POLITICAL PARTICIPATION AND AMERICAN DEMOCRACY 1, 1–21 (William Crotty ed., 1991) (analyzing the reasons for the low number of Americans citizens who vote); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2135–38 (1996).

<sup>21</sup> Noury, *supra* note 3, at 180.

studies of legislative abstention,<sup>22</sup> which, as we shall see, is especially odd given the more significant role that it plays in outcomes. In any case, the studies of both large and small scale election procedures confirm the impression that abstention is viewed as something that expresses indifference with respect to outcomes.

### 1. *Abstention in Large Public Elections*

For large electorates, abstention is often viewed as an expression of indifference. Downs, with his focus on the instrumental aspect voting (the P and the B in the rational choice theory equation), explains indifference as driving the B term down to zero because an indifferent voter, by definition, receives no benefit from the election of any particular candidate.<sup>23</sup> Such indifference, he notes, could reflect either equal satisfaction or equal disgust with the alternatives.<sup>24</sup> If voting were costless, only those who were perfectly indifferent would abstain, for all others would at least generate *some* expected utility (captured by the PB term), no matter how low the probability of casting the critical vote.<sup>25</sup> If, as is the case, voting had real costs, then others would also abstain, depending, in part, upon a range of factors that included the individual costs (C), the probability of being critical (P), and their relative level of preference for the candidates (the B term, which would have a value greater than zero).<sup>26</sup> Something short of perfect indifference would, therefore, still play a role in driving up abstentions, as voters with only slight preferences for one candidate over another would be less likely to vote than voters with more substantial preferences. One of the causes of abstention, then, is voter indifference.

What Downs terms "equal disgust" with the electoral alternatives looks like it captures one of the second major causes of abstention: voter alienation.<sup>27</sup> Alienated voters, however, abstain not because they are indifferent, but because the slated candidates are too far away from their

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<sup>22</sup> See *id.* (listing studies dedicated to this subject). For other works studying abstention, see generally KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 210–26 (1997) (providing a broad historical study of congressional abstention); Linda R. Cohen & Roger G. Noll, *How to Vote, Whether to Vote: Strategies for Voting and Abstaining on Congressional Roll Calls*, 13 POL. BEHAV. 97 (1991) (detailing a study of congressional abstention with regard to a series of votes on a bill regarding the Clinch River Breeder Reactor); Lawrence S. Rothenberg & Mitchell S. Sanders, *Legislator Turnout and the Calculus of Voting: The Determinants of Abstention in the U.S. Congress*, 103 PUB. CHOICE 259, 260 (2000) (describing a study of congressional abstention of votes in the House of Representatives of the 104th Congress).

<sup>23</sup> DOWNS, *supra* note 9, at 262–63.

<sup>24</sup> *Id.* at 263. Downs, however, settles on the view that indifferent voters are basically satisfied with the choices because the political system would produce candidates that basically satisfied its voters. *Id.*

<sup>25</sup> *Id.* at 261–63.

<sup>26</sup> *Id.* at 265–71.

<sup>27</sup> *Id.* at 262.



ideal point.<sup>28</sup> For an alienated voter, there may be instrumental benefit to the election of a particular candidate, and thus such a voter is not necessarily indifferent. But this benefit is outweighed in the equation by the value of protesting against a political system that offers such lousy choices. This value may be alternatively described as a noninstrumental *benefit* of abstaining (the satisfaction of registering your dissatisfaction) or a *cost* of voting (losing out on that benefit). Either way, this is captured in the C and D terms of the equation, and indicates a net noninstrumental loss to casting a vote.

Alienated voters may abstain in different ways. In many cases, they may simply fail to show up at the polls on election day. In countries with compulsory voting, such a failure is obviously a more potent method of registering dissatisfaction, and hence such protest abstention has been observed and studied in places such as Brazil<sup>29</sup> and the former USSR.<sup>30</sup> Alienated voters may also make their intentions clear by actually showing up at the polls and casting a protest vote. In some jurisdictions, even in the United States, the official ballot contains a “None of the Above” option.<sup>31</sup> In other places, voters may intentionally nullify their ballots by writing in the same sentiment, writing in the name of a cartoon character, or drawing an X through the ballot.<sup>32</sup> The protest may be that of a single individual or of a more organized campaign, as in the recent “Voto Nulo” campaign in Mexico’s recent midterm elections.<sup>33</sup> In any case, abstention is a way to express dissatisfaction with the slated candidates or, in some cases, the entire political system.

Of course, people may abstain for all sorts of other reasons in large elections. Indeed, it’s somewhat of a cottage industry among political scientists and other academics to catalogue the many determinants of turnout.<sup>34</sup> As mentioned above, most of those reasons have to do with the

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<sup>28</sup> Paul W. Thurner & Angelika Eymann, *Policy-Specific Alienation and Indifference in the Calculus of Voting: A Simultaneous Model of Party Choice and Abstention*, 102 PUB. CHOICE 51, 53 (2000).

<sup>29</sup> See generally Timothy J. Power & J. Timmons Roberts, *Compulsory Voting, Invalid Ballots, and Abstention in Brazil*, 48 POL. RES. Q. 795 (1995).

<sup>30</sup> See generally Rasma Karklins, *Soviet Elections Revisited: Voter Abstention in Noncompetitive Voting*, 80 AM. POL. SCI. REV. 449 (1986).

<sup>31</sup> See, e.g., NEV. REV. STAT. § 293.269 (2008) (requiring every ballot for statewide office or for United States President or Vice President to include an option to vote for “[n]one of these candidates”).

<sup>32</sup> The exact effect of such votes depends upon the election procedures in place. See, e.g., HENRY M. ROBERT ET AL., ROBERT’S RULES OF ORDER 401–03 (10th ed., 2000) [hereinafter ROBERT’S RULES] (explaining that such illegal ballots usually count for the purposes of the quorum but not as either a “yea” or “nay” vote).

<sup>33</sup> See, e.g., Marc Lacey, *Disgruntled Mexicans Plan an Election Message to Politicians: We Prefer Nobody*, N.Y. TIMES, June 21, 2009, at A8 (detailing the “Voto Nulo” campaign in Mexico’s midterm elections).

<sup>34</sup> See, e.g., NIEMI & WEISBERG, *supra* note 20, at 22; PIVEN & CLOWARD, *supra* note 20, at 16–21; TEIXEIRA, *DISAPPEARING AMERICAN VOTER*, *supra* note 20, at 1–5, 10–13; TEIXEIRA, *TURNOUT DECLINE*, *supra* note 20, at 27–34; CROTTY, *supra* note 20, at 1–21; HASEN, *supra* note 20, at 2135–38.

relative noninstrumental costs and benefits to voting (the C and D terms). The costs of voting, for example, may be driven up by illness, bad weather, or difficult registration requirements. The sense of citizen duty may wax and wane with the perceived importance of an election. The list of reasons why an individual voter may decide to vote or abstain is, indeed, quite long.

That said, none of the theories of voter abstention holds that a decision to abstain expresses anything other than indifference among the ballot alternatives. In some cases, when indifference is said to drive the decision, this is quite obvious. But even when abstention is a product of voter alienation or some other mix of noninstrumental costs and benefits, there is no claim that the abstention is intended to have any effect on the passage of a proposition or the election of a particular candidate. Abstention in large, public elections is thought to be neutral with respect to the outcome.

## 2. *Abstention in Small Legislative Bodies*

Abstention gets more interesting in smaller legislative bodies. In part, this is so because as the size of the electorate goes down, the probability of casting the decisive vote goes up. The P factor, which drove the instrumental benefit of voting down to near zero in large elections (and caused so much angst among rational choice theorists), plays a more significant role in small group decision-making.<sup>35</sup> Abstention is also more interesting in small groups because the decision to abstain is driven by a new set of noninstrumental reasons.

The chance to cast the critical vote in a smaller body is mainly a mathematical proposition. Regardless of how one calculates the probability—and there are many different methods—the chance of casting a swing vote generally goes up as the size of the electorate goes down. Voters in smaller decision-making bodies may also be in a better position to assess ahead of time whether a given vote will be close. These two aspects of smaller bodies have produced the testable hypotheses that there will be fewer abstentions as both: (1) the electorate becomes smaller; and (2) the decision is anticipated to be closer.<sup>36</sup> Both factors should drive up P, the probability of being decisive, and, all other things being equal, should drive down the number of abstentions as voters have a greater chance of casting the critical vote. And while there have been a limited number of studies of legislative abstention, there is some evidence to support these hypotheses.<sup>37</sup>

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<sup>35</sup> See Noury, *supra* note 3, at 184; Rothenberg & Sanders, *supra* note 22, at 260.

<sup>36</sup> See Noury, *supra* note 3, at 183–84.

<sup>37</sup> See *id.* at 182–85 (using studies of voting behavior among members of the European Parliament to demonstrate that more members will vote when roll calls are closer and “abstention increases with the size of Parliament”). Noury also cites similar studies examining the voting patterns of Congress, again finding that closeness plays a role. *Id.* at 186.

More importantly, there are a few additional noninstrumental reasons that drive legislative abstentions. Many bodies have conflict-of-interest rules, written or unwritten, which require their members to abstain any time they have a direct interest in the outcome of the vote not shared by other members of the body. The U.S. House of Representatives, for example, requires its members to vote on legislation unless they have “a direct personal or pecuniary interest in the event of such question.”<sup>38</sup> The U.S. Senate<sup>39</sup> and all state legislatures<sup>40</sup> have similar rules, as do all entities that have adopted manuals of parliamentary procedure such as *Robert’s Rules of Order*.<sup>41</sup> Such voters are anything but indifferent, but indifference, in the form of an abstention, is forced upon them to avoid impropriety.

In other cases, legislators may abstain because they are reluctant to be identified with a particular position.<sup>42</sup> Sometimes they just do so by not casting a vote at all, but some legislative bodies—including the U.S. House of Representatives<sup>43</sup> and some state legislatures<sup>44</sup>—offer an option of voting “present.” (Indeed, Barack Obama was criticized during the presidential campaign for casting nearly 130 “present” votes while a member of the Illinois Senate.)<sup>45</sup> Here, the indifference is feigned in order to cater to some other long-term interest. Although the causes of “forced” and “feigned” indifference are quite dissimilar, the effect is the same—the voter abstains, and that abstention is thought to have no effect on the vote. Indeed, the use of abstention in such cases tells us quite directly that an abstention is thought to be absolutely neutral with respect to the outcome.

Of course, voters in smaller bodies may have the more run-of-the-mill reasons for abstaining that this Article has already discussed. They may actually be indifferent. They may be protesting some aspect of the decision-making procedure. Or there may be all sorts of other noninstrumental costs and benefits associated with casting a vote. Indeed, one such “cost” was on display in a study of abstention in the European Parliament, where the authors of the study were forced to make “Friday” into a dummy variable because so many members skipped town for the

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<sup>38</sup> RULES OF THE HOUSE OF REPRESENTATIVES, 111TH CONG., RULE III, cl. 1 (2009) [hereinafter HOUSE RULES].

<sup>39</sup> RULES OF THE SENATE, 111TH CONG., RULE XXXVII, cl. 4 (2009).

<sup>40</sup> *Voting Recusal Provisions*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 2009) <http://www.ncsl.org/?TabId=15357>.

<sup>41</sup> See ROBERT’S RULES, *supra* note 32, at 394 (“No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization.”).

<sup>42</sup> See MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES 69–70 (1974); Freixas & Zwicker, *supra* note 7, at 401 n.1.

<sup>43</sup> HOUSE RULES, RULE XX, cl. 2(a), 4(a).

<sup>44</sup> See, e.g., RULES OF THE SENATE OF THE STATE OF ILLINOIS, 96th Gen. Assemb., art. I, Senate Rule 1-9 (2009).

<sup>45</sup> Hernandez & Drew, *supra* note 2, at A1.

weekend and missed the votes.<sup>46</sup> (The European Parliament subsequently eliminated Friday sessions for that very reason.)<sup>47</sup> Whatever the causes, however, abstention in smaller decision-making bodies, as with larger ones, is expected to have a neutral effect on the outcome.

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While the scholarly commentary on abstention is limited, it is fairly consistent. People abstain for a variety of reasons. In larger elections, those reasons tend to have more to do with the noninstrumental costs and benefits of voting than with the potential effect of a vote on the outcome. This is less true in smaller legislative settings, where different kinds of noninstrumental motivations come into play and the chance that a vote could actually change the outcome becomes more significant. In both cases, though, the expectation is that abstention is an expression of indifference. As such, abstention is viewed as being neutral among alternatives and as an act that, compared with voting, reduces the chances of success for a favored alternative. As we shall see in the next part of this Article, these assumptions are often wrong.

### III. THE POWER OF ABSTENTION

Widespread beliefs about abstention are misguided in two respects. First, there are circumstances in which eligible voters are more likely to achieve their desired outcomes by abstaining rather than by voting their true preferences. Second, under many voting procedures, an abstention has the effect of casting a weighted vote—with the weight ranging from slightly more than half of a vote to a full vote—in favor of or against a particular alternative. Taken together, these two features of abstention undercut scholarly theories and widespread voter beliefs regarding the neutral effect of abstention.

#### A. *The No-Show Paradox*

Abstention has a surprising effect on outcomes in a phenomenon called the “No-Show Paradox.” Peter Fishburn and Steven Brams first described the paradox in an article in *Mathematics Magazine*.<sup>48</sup> There, they tell the tale of a couple whose car breaks down on the way to the polls, preventing them from casting their ballot for their favorite candidate in a three-way race.<sup>49</sup> Their favorite candidate is eliminated in the first stage of a plurality

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<sup>46</sup> See Noury, *supra* note 3, at 192.

<sup>47</sup> See *id.* at 200.

<sup>48</sup> See generally Peter C. Fishburn & Steven J. Brams, *Paradoxes of Preferential Voting: What Can Go Wrong with Sophisticated Voting Systems Designed To Remedy Problems of Simpler Systems*, 56 MATHEMATICS MAG. 207 (1983).

<sup>49</sup> *Id.* at 208.

runoff procedure, but their second-favorite candidate ends up winning the election.<sup>50</sup> After the election, the couple discovers that, had they voted, their favorite candidate would have made it to the runoff, but would have then lost to their least-favorite candidate.<sup>51</sup> The couple, in other words, achieved a better result by not voting than they would have by voting their true preferences. This is an instance of what Fishburn and Brams termed the No-Show Paradox.<sup>52</sup>

### 1. *The No-Show Paradox Defined*

The No-Show Paradox occurs when a voter is better off (in terms of achieving a desired outcome) by not voting rather than voting according to her preferences.<sup>53</sup> The most straightforward example of this is known as the strong No-Show Paradox.<sup>54</sup> The amendment procedure, commonly used in legislative and parliamentary voting, is vulnerable. Take, for example, the following profile involving the preferences of nine voters over alternatives A, B, and C, with the most desired alternative on top<sup>55</sup>:

2 voters	3 voters	2 voters	2 voters
A	B	C	C
B	C	A	B
C	A	B	A

If the agenda of pairwise votes in the amendment procedure is A vs. B, winner to face C, then the winner if everyone votes is B (since B beats A 5–4 in the first round, and B beats C 5–4 in the second round). But suppose the two voters on the right decide to abstain. In that case, C, their first-ranked alternative, would be the winner (since A beats B 4–3, then C beats A 5–2). So if the members of that group vote their true preferences, their first-ranked alternative loses, but if they abstain, their first-ranked alternative wins. Abstaining in such a situation certainly wouldn't express indifference; in fact, it would be an effortless way to ensure the election of your favorite alternative!

Perhaps we should have seen this coming from social choice theory. Although social choice theorists have spent little time examining abstentions, they have long known that when certain types of preference profiles are fed into certain decision procedures, there is the possibility for

<sup>50</sup> *Id.* at 208–09.

<sup>51</sup> *Id.* at 209.

<sup>52</sup> *Id.* at 207.

<sup>53</sup> See HANNU NURMI, VOTING PARADOXES AND HOW TO DEAL WITH THEM 49 (1999).

<sup>54</sup> Hannu Nurmi, *Monotonicity and Its Cognates in the Theory of Choice*, 121 PUB. CHOICE 25, 33–34 (2004).

<sup>55</sup> *Id.* at 33 tbl.9.

paradoxes and manipulation. Indeed, the most famous corollary of Arrow's theorem—the Gibbard-Satterthwaite theorem—holds that all nondictatorial voting systems are vulnerable to strategic manipulation.<sup>56</sup> If one can achieve a desired outcome by voting against one's true preferences, it should not be that surprising that one could achieve a similar result by not voting at all. But, unlike strategic voting, strategic *abstention* has not been the topic of much discussion.

As these examples show, the paradox can occur when certain voting procedures are applied to certain preference profiles. Abstaining in these circumstances does not merely rob your preferred candidate of additional support. Nor does it help (or hurt) all candidates equally. Instead, abstaining actually helps your preferred candidate. The question then becomes whether these examples are artificial constructs of bored social choice theorists or accurate representations of actual voters using common decision-making procedures. The following three examples give some sense of the range and power of the paradox.

## 2. Examples

### a. Large Electorate Using a Plurality Runoff Procedure

The plurality runoff procedure, used in many jurisdictions, is a sequential voting scheme used to ensure majority support of a single alternative.<sup>57</sup> After the first round of voting, if any alternative receives majority support, then it is declared the winner. If none of the alternatives receives majority support, then the two alternatives receiving the most votes are placed in a runoff to choose the winner.<sup>58</sup> This common voting method can cause some perverse results in situations like the following<sup>59</sup>:

47% of voters	2% of voters	26% of voters	25% of voters
A	A	C	B
B	B	A	C
C	C	B	A

<sup>56</sup> Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 *ECONOMETRICA* 587, 587 (1973); Mark Allen Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 *J. ECON. THEORY* 187, 188 (1975).

<sup>57</sup> RIKER, *supra* note 6, at 74–76, 85–88; Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right To Vote and the Choice of a Voting System*, 2006 *MICH. ST. L. REV.* 327, 333.

<sup>58</sup> There are actually at least two versions of plurality runoff procedures. This example uses top-two runoff voting, which is one of the most common election methods. O'Neill, *supra* note 57, at 333. Another variation is an elimination runoff election, where the alternatives with the lowest totals are eliminated in successive rounds until there is a majority support for one alternative. *Id.* at 334. In this example, with just three alternatives, this distinction does not matter.

<sup>59</sup> This example is from Nurmi, *supra* note 54, at 31 tbl.7.

If everyone votes, then in the first round, A (49%) and C (26%) make it to the runoff, while B (25%) is eliminated. In the runoff, C (51%) beats A (49%). Thus, if everyone votes, the winner is C. If, on the other hand, the group of voters on the left abstains, we get a different result. A is deprived of most of its votes in the first round necessitating a runoff between B (25%) and C (26%) (neither constitutes a majority of the remaining 53% of the voters). In the runoff, B (27%) beats C (26%). Thus, if the group on the left votes, the winner is C, its least-preferred alternative; if that group abstains, then the winner is B, which, while not the group's favorite, is still strictly preferred to C. In this case, therefore, the voters on the left are better off abstaining than voting their true preferences.

This instantiation of the No-Show Paradox is important for several reasons. First, it shows that the paradox may occur using a voting procedure commonly used in large elections. The runoff is, after the plurality method, the second-most common single-winner election method in the United States.<sup>60</sup> Most southern states use runoff elections to fill their federal and state offices, and many local jurisdictions across the rest of the country do so as well.<sup>61</sup> In addition, many countries use runoff procedures to elect their presidents, members of their national legislature, or both.<sup>62</sup> Second, this example is important because it shows that there may be situations where a substantial portion of the electorate (47%!) would be better off staying at home on election day. Thus, a common election procedure may give rise to a highly counterintuitive result.

#### b. Small Electorate Using Amendment and Successive Procedures

The amendment procedure is a sequential voting procedure used by many parliaments and legislatures.<sup>63</sup> Various alternatives to the status quo, in the form of bills and amendments thereto, are considered according to an agenda. The amendment procedure gives us unexpected results in an example with the following preference profile over alternatives A, B, C, and the status quo, represented by D:<sup>64</sup>

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<sup>60</sup> See O'Neill, *supra* note 57, at 333.

<sup>61</sup> CHARLES S. BULLOCK III & LOCH K. JOHNSON, RUNOFF ELECTIONS IN THE UNITED STATES 2, 3 tbl.1.1 (1992).

<sup>62</sup> See INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 27–33 (2005).

<sup>63</sup> For a full description of the procedure, see RIKER, *supra* note 6, at 69–73; Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1012 (1989) (noting the ubiquity of the amendment procedure and its vulnerability to voting paradoxes); Grant M. Hayden, Note, *Some Implications of Arrow's Theorem for Voting Rights*, 47 STAN. L. REV. 295, 301–02 (1995).

<sup>64</sup> This example is from Nurmi, *supra* note 54, at 32.

10 voters	10 voters	10 voters
A	B	D
B	D	C
D	C	A
C	A	B

Suppose the agenda is the following: (1) B vs. D; (2) winner to face A; (3) winner to face C. If everyone votes, C wins, since B beats D 20–10, A beats B 20–10, and C beats A 20–10. Yet the status quo, D, is preferred by *every* voter to C. Had every voter abstained, they would have all been better off.

This instantiation of the paradox involves a commonly used legislative voting procedure. Virtually all legislative bodies use some version of the amendment procedure to pass laws, and smaller electoral bodies, following standard parliamentary procedure, are also vulnerable.<sup>65</sup> This version of the paradox also involves a quite dramatic situation where, if *everyone* abstains, everyone benefits.

### c. Large or Small Electorate with a Quorum Requirement

Both of the preceding examples involved successive voting procedures involving more than two alternatives. But a version of the paradox may present itself in certain situations where a single majority vote among two alternatives is coupled with a turnout condition.<sup>66</sup> Many legislative bodies and committees often have quorum requirements, which ensure that a certain percentage of members must be present in order to conduct business. In some cases, including both the U.S. House of Representatives and the U.S. Senate, the quorum is set at a simple majority of the eligible voting members.<sup>67</sup> Many countries conduct referenda with participation or approval quorums—turnout requirements that function, for our purposes, the same way.<sup>68</sup> Italy, for example, has a participation quorum such that changing the status quo requires that a majority of the voters support the proposition *and* that a majority of registered voters take part in the vote.<sup>69</sup>

<sup>65</sup> See RIKER, *supra* note 6, at 69–71; ROBERT'S RULES, *supra* note 32, at 125.

<sup>66</sup> See Paulo P. Côte-Real & Paulo T. Pereira, *The Voter Who Wasn't There: Referenda, Representation and Abstention*, 22 SOC. CHOICE & WELFARE 349, 351 (2004); Luís Aguiar-Conraria & Pedro C. Magalhães, *Referendum Design, Quorum Rules and Turnout 2* (Am. Political Sci. Ass'n, 2009 Toronto Meeting Paper, Sept. 5, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1451131](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451131)).

<sup>67</sup> U.S. CONST. art. I, § 5.

<sup>68</sup> See Côte-Real & Pereira, *supra* note 66, 354 tbl.1; Aguiar-Conraria & Magalhães, *supra* note 66, at 2.

<sup>69</sup> See Côte-Real & Pereira, *supra* note 66, at 354–55, 354 tbl.1; Aguiar-Conraria & Magalhães, *supra* note 66, at 2.



When used on either a small or large scale, such requirements are intended to ensure that outcomes are representative of the entire electorate. But they give rise to a version of the No-Show Paradox.

In the presence of such quorum requirements, it is fairly easy to conjure up situations where voters are better off abstaining than showing up and casting a vote for their preferred alternative. If a voter is against the proposition, she gets what she wants if *either* the quorum requirement is met and a majority of “no” votes exists *or* the quorum requirement is not met. Thus, she faces a dilemma. She can show up and vote no, in which case she registers her preference but contributes toward the quorum requirement, or she can abstain, in which case she doesn’t contribute toward the turnout requirement but fails to register her preference. In cases where she calculates that she is more likely to defeat the proposal with the latter strategy than the former, she abstains. Thus, this is another instance where a voter may be better off abstaining.

This version of the paradox is significant for several reasons. First, unlike the earlier examples, it may occur in a non-sequential voting procedure applied to just two alternatives. Second, there is good evidence that this version of the paradox has occurred and has been acted upon (or, more aptly, *not* acted upon). In 2003, Texas Democrats in the state house and state senate fled to Oklahoma and New Mexico, respectively, in order to defeat quorum requirements in an attempt to prevent passage of a redistricting bill that would have favored Republicans.<sup>70</sup> On a larger scale, Italian voters were presented with a referendum in 2005 that would have liberalized the regulation of in vitro fertilization.<sup>71</sup> The Catholic Church opposed the measure, and Pope Benedict XVI gave a speech just four days before the vote asking, “What is the principle of wisdom, if not to abstain from all that is odious to God?”<sup>72</sup> Italian voters took the hint: even though ninety percent of people who actually voted supported the changes, turnout was well below the required majority participation quorum, leading to defeat of the measure.<sup>73</sup> While these examples undercut the claim that this version of the No-Show Paradox sneaks up on more sophisticated political actors—indeed, quorum-busting is a well-known legislative technique—it does help reinforce just how many democratic decision-making procedures are vulnerable to it.

### 3. Implications

Voters assume that their preferred alternatives will be less likely to win if they abstained than if they voted. As can be seen in the foregoing

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<sup>70</sup> *Democrats on the Run, Again*, N.Y. TIMES, July 29, 2003, at A18.

<sup>71</sup> Aguiar-Conraria & Magalhães, *supra* note 66, at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

examples, this assumption is clearly wrong under certain conditions. The question then becomes how often these conditions are present in democratic voting regimes. To answer this, we first need to know how often we actually use voting procedures that are vulnerable to the paradox and, second, how often we are faced with preference profiles that give rise to it.

As demonstrated above, many popular voting procedures are vulnerable to the paradox. Further, Hervé Moulin showed that every voting procedure that picks the Condorcet winner, when one exists, is vulnerable to the paradox.<sup>74</sup> Other common methods that are not Condorcet extensions, such as the plurality runoff and instant runoff voting, are also at risk.<sup>75</sup> Moreover, parliamentary and electoral procedures that make use of quorum or turnout requirements are also susceptible to a version of this problem, even in cases where there are only two alternatives being considered. Thus, many common voting procedures are susceptible to the No-Show Paradox.

It's not as clear, though, that the types of preference profiles that give rise to the No-Show Paradox occur very often. Aside from the quorum-busting example, most versions of the paradox trade on the occurrence of a voting cycle. A voting cycle occurs when the social preference order is intransitive, such as when A beats B, B beats C, and C beats A. While social choice theorists originally believed that a large percentage of preference profiles gave rise to such cycles, more recent empirical work across a range of voting mechanisms have failed to discover them.<sup>76</sup> The gap is most probably explained by the fact that early predictions were based on an impartial culture assumption—that all permutations of individual preference orders were equally likely to occur in a preference profile.<sup>77</sup> With such an assumption, for example, almost one-third of the preference profiles that occur within a large electorate over six alternatives produce a voting cycle.<sup>78</sup> In the absence of the assumption, though, the predicted rate of cycles may decline.

This is especially true if the voting population has something loosely

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<sup>74</sup> See Hervé Moulin, *Condorcet's Principle Implies the No Show Paradox*, 45 J. ECON. THEORY 53, 55 (1988). The Condorcet winner is the option that would beat each of the other options in a series of simple pairwise contests. For background on the Condorcet voting procedures, see RIKER, *supra* note 6, at 67–69.

<sup>75</sup> The examples above demonstrate this to be true of plurality runoff procedures; instant runoff voting procedures, for obvious reasons, are similarly vulnerable.

<sup>76</sup> See Scott L. Feld & Bernard Grofman, *Partial Single-Peakedness: An Extension and Clarification*, 51 PUB. CHOICE 71, 71 (1986); Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1553 (1993).

<sup>77</sup> See Richard G. Niemi & Herbert F. Weisberg, *A Mathematical Solution for the Probability of the Paradox of Voting*, 13 BEHAV. SCI. 317, 321 (1968).

<sup>78</sup> See *id.* at 322 tbl.2.

referred to as “spectrum agreement.”<sup>79</sup> Spectrum agreement occurs when individual voters array their preferences along a common spectrum—political candidates, for example, may be placed on a common liberal to conservative spectrum.<sup>80</sup> Such agreement may come in a variety of forms: it exists, for example, when voter preferences are “single-peaked” or, more broadly, “value restricted.”<sup>81</sup> The important thing about these various forms of spectrum agreement is that they are a sufficient condition of transitive outcomes.<sup>82</sup> While the required *complete* spectrum agreement is probably rare among large electorates, recent work in social choice theory demonstrates that much lesser degrees of social homogeneity will usually be enough to eliminate the possibility of a voting cycle.<sup>83</sup> And we have a range of political, economic, sociological, and psychological reasons to believe that members of most electorates will exhibit a large degree of spectrum agreement.<sup>84</sup> Thus, without the requisite preference profile, voting cycles—along with many versions of the No-Show Paradox—are less likely to occur.

That said, the No-Show Paradox is a real feature of democratic decision-making. The quorum-busting version of it shows up often enough to invalidate the assumption that voting for a preferred candidate is always better than not voting. The widespread use of voting procedures that are vulnerable to the paradox also demonstrates the potential for counterintuitive results, though the number of actual incidences of the paradox may be limited by the small number of social preference profiles that give rise to voting cycles. Thus, the No-Show Paradox is a strongly counterintuitive feature of the decision to abstain that may occur with some frequency in our democratic voting procedures. The next subsection, however, shows that one of our fundamental intuitions about abstention—that it expresses something akin to indifference—is often false.

### B. *When Abstention Fails To Express Indifference*

The No-Show Paradox demonstrates that, in some situations, people can make their favored outcome more likely by withholding their votes. But there is a second, more powerful feature of abstentions that has entirely escaped notice. In many situations, abstaining is the equivalent to

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<sup>79</sup> Grant Hayden & Matthew Bodie, *Arrow's Theorem and the Exclusive Shareholder Franchise*, 62 VAND. L. REV. 1217, 1235–37 (2009).

<sup>80</sup> See *id.* at 1235.

<sup>81</sup> See *id.* at 1236.

<sup>82</sup> See RIKER, *supra* note 6, at 123–28; Hayden & Bodie, *supra* note 79, at 1235.

<sup>83</sup> See Feld & Grofman, *supra* note 76, at 72–73; Hayden & Bodie, *supra* note 79, at 1236–37; Richard G. Niemi, *Majority Decision-Making with Partial Unidimensionality*, 63 AM. POL. SCI. REV. 488, 488 (1969).

<sup>84</sup> See NORMAN FROHLICH & JOE A. OPPENHEIMER, *MODERN POLITICAL ECONOMY* 19–20 (1978); Hayden & Bodie, *supra* note 79, at 1237.

casting a vote weighted in favor of one of the alternatives. This insight arises out of a fast-developing branch of social choice theory called voting power theory.

### 1. *Voting Power Theory*

Voting power theory focuses its attention on weighted voting systems in which voters are given different amounts of influence on the outcome of an election.<sup>85</sup> This type of voting system is used everywhere from the European Union Council of Ministers to shareholder meetings (where votes are weighted by the number of shares) to the U.S. Electoral College. Voting power is typically defined as the ability to influence the outcome.<sup>86</sup> The primary insight of voting power theory is that voting power is not the same as—or even proportional to—voting weight.<sup>87</sup>

Take, for example, a governing body with four members (A, B, C, and D) whose respective voting weights are 9, 7, 4, and 1. If they make decisions using majority rule, they need a total of 11 (out of the 21 total) to pass any resolution. How do you analyze the voting power of the four members? Let's start with our intuitions. We would suspect that voter A (with 9) has more power than B (7), and much more power (more than twice the voting weight!) than C (4). One would also suspect that voter D (1) has very little voting power, but that a little power is better than none at all.

Basic voting power theory, however, reveals the flaws in these intuitions. Voters A, B, and C actually have identical voting power, and D has none. There are three minimally sufficient coalitions to reach the required threshold of 11: AB (with 16); AC (with 13); and BC (with 11). A, B, and C have an equal chance of casting the decisive vote; D's vote is never relevant. Voting power analysis reveals that this situation is actually equivalent to that of a three-member body (A, B, and C) with one equally-weighted vote apiece and majority rule (which, keeping the votes whole in this case, would require 2 out of the 3 votes). Voting power is not necessarily the same as, or proportional to, voting weight.

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<sup>85</sup> See FELSENTHAL & MACHOVER, *supra* note 7, at 3–5. For a brief history of voting power theory, see *id.* at 6–10. Voting power theory made its biggest splash in a series of articles in the late 1960s by John Banzhaf. See generally John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle*, 75 YALE L.J. 1309 (1966); John F. Banzhaf III, *One Man, 3,312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968); John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317 (1965). Courts, by and large, did not follow Banzhaf's arguments. See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688, 697–99 (1989) (rejecting the application of Banzhaf's measure of voting power in a case involving the New York City Board of Estimate). For a brief history of the use of voting power theory at the state and local level, see Jurij Toplak, *Equal Voting Weight of All: Finally “One Person, One Vote” from Hawaii to Maine?*, 81 TEMP. L. REV. 123, 151–57 (2008).

<sup>86</sup> See FELSENTHAL & MACHOVER, *supra* note 7, at 36 (referring to the ability to influence the outcome as “I-power”).

<sup>87</sup> See *id.* at 2–3.

Although voting power theory typically analyzes voting games where the voting weights are expressed as whole numbers, voting power may be expressed in other ways. One may re-describe the voting game above as four voters with voting weights that are fractions of the total (9/21, 7/21, 4/21, and 1/21). Or, more to the point, in a voting situation where members have equally weighted votes, we may talk about fractions of each vote. Because such votes are usually indivisible, a voter typically casts a vote with weight of 100% (a yea vote) or 0% (a nay vote). But one may further analyze voter actions, such as abstention, in terms of the voting weight. The assumption that abstaining is a neutral expression of indifference, for example, may be restated as the equivalent of casting a vote weighted at 50%, a fifty-fifty proposition. The question, then, is whether that accurately captures what goes on with abstention.

## 2. *Abstention*

Unfortunately, voting power theory, like other theories of voting, has been late to the game when it comes to considering abstentions. Most of the work assumes that voters cast their votes and then analyzes their relative voting power. A few recent pieces have built abstentions into the analysis,<sup>88</sup> but not in a way that lends much insight to the precise issues discussed below.

The effect of an abstention obviously depends upon the election procedures in place. One procedural feature is particularly important: whether the election uses an absolute or relative quota. A quota is the decision threshold for an election. Elections commonly use quotas such as majority rule or supermajority requirements such as two-thirds or three-fifths approval. A proposition is passed if the total weight of the vote for it is equal to or greater than the quota. An absolute quota is when a certain number of votes in favor of a proposition is required for approval. A relative quota is when a required fraction of votes in favor of a proposition is required for approval.

Take, for example, a legislative body composed of 100 eligible voters. If that body makes a decision through a vote requiring an absolute quota of 3/5, then at least 60 votes must be cast in favor of the proposition in order for it to pass. The number of abstentions, for whatever reason, would have no effect on the number of votes required for passage. It's always 60. If, on the other hand, that body uses a relative quota of 3/5, then the number of votes required for passage may vary with the number of voters casting a ballot. If all 100 members vote, then, as with the absolute quota, the measure passes with at least 60 votes. But if 10 voters abstain on a

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<sup>88</sup> See generally *id.* at 279–93; Braham & Steffen, *supra* note 7; Lindner, *supra* note 7; Felsenthal & Machover, *Models and Reality*, *supra* note 7; Felsenthal & Machover, *Ternary Voting Games*, *supra* note 7; Freixas & Zwicker, *supra* note 7.

particular vote, then 54 votes in favor (3/5 of the remaining 90 voters) would be required for approval. The basic difference, then, is that an absolute quota does not change with respect to the number of voters, but a relative quota does.

There are a fair number of electoral bodies with absolute quota requirements.<sup>89</sup> They are most often used to ensure adequate support when making changes to constitutions, bylaws, and other fundamental documents. Proposed amendments to the U.S. Constitution, for example, must be ratified by an absolute quota of three-fourths of the states, now thirty-eight,<sup>90</sup> and an absolute majority of shareholders must approve of a corporate merger.<sup>91</sup> But they are sometimes used in other situations. Many state legislatures, for example, require absolute majorities to pass state laws.<sup>92</sup> Absolute quotas act to ensure a certain level of participation along with the required support.

With absolute quotas, an abstention affects the outcome in a relatively straightforward way—it functions the same as a “no” vote.<sup>93</sup> In our hypothetical legislative body of 100 voters, the quota remains at 60 votes in favor regardless of how many members cast a ballot—voting “no” and abstaining both cut into the number of votes required for passage. Indeed, *Robert’s Rules of Order* acknowledges this, albeit in a rather confused fashion. The book warns that absolute quotas are “generally undesirable” in part because those “who fail to vote through indifference rather than through deliberate neutrality may affect the result negatively.”<sup>94</sup> The confusion arises because indifference should be contrasted with deliberate *opposition*, not *neutrality*, because the point of the warning is that abstention affects the result negatively. And while the negative effect of abstaining with an absolute quota may be obvious to more sophisticated voters, this confusion reminds us that it is completely at odds with the widespread impression that an abstention signals something akin to indifference.

One thing is clear: for legislative bodies using absolute quotas, abstentions count as votes against a proposition. This is interesting, since it doesn’t support the general meme that abstention expresses indifference.

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<sup>89</sup> For a general discussion of absolute majority quotas, see Adrian Vermeule, *Absolute Majority Rules*, 37 BRIT. J. POL. SCI. 643, 643–47 (2007).

<sup>90</sup> U.S. CONST. art. V (providing that amendments “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof”).

<sup>91</sup> See, e.g., DEL. CODE ANN. tit. 8, § 251(c) (2010).

<sup>92</sup> See, e.g., CAL. CONST. art. IV, § 8(b); MINN. CONST. art. IV, § 22.

<sup>93</sup> See ROBERT’S RULES, *supra* note 32, at 390; Sreejith Das, Abstaining (Almost) Never Expresses Indifference: A Short Note on Abstention in Weighted Voting Games (2009) (unpublished manuscript) (on file with the author) [hereinafter Das, Abstaining]; Sreejith Das, Class Conditional Voting Probabilities (unpublished Ph.D thesis, Birkbeck College, University of London, 2008) [hereinafter Das, Voting Probabilities].

<sup>94</sup> ROBERT’S RULES, *supra* note 32, at 390.

But, in the grand scheme of things, only a few legislative bodies, and almost no large public elections, use absolute quotas. The more interesting result appears when the voting procedure makes use of a relative quota.

For most large public elections and many smaller legislative bodies, relative quotas are the procedural norm. Most public elections are decided by either a majority or plurality of the votes cast—a relative quota. Legislative votes typically operate the same way. Both houses of Congress, for example, use relative quotas in most of their lawmaking. And, as we saw above, smaller parliamentary bodies making use of *Robert's Rules of Order* have a preference for relative quotas in their decision-making.<sup>95</sup>

The effect of an abstention on a vote with a relative quota is less straightforward than with an absolute quota, but, nonetheless, has not been the subject of much scholarly attention. The relative quota, true to its name, changes along with the number of abstentions. The relative quota in our hypothetical legislative body, for example, moved along with the number of members who abstain—or, more directly, with the number of remaining voters who cast a vote for or against the proposition. Unlike the case of an absolute quota, abstentions are not counted as votes for or against a proposition, but instead as a *tertium quid*, some “third thing.”<sup>96</sup>

That “third thing” is regarded in different ways, but is widely believed to have no effect on the outcome. Some conceive of an abstention as a third kind of vote, a way of splitting the difference or spreading voting power equally among the alternatives.<sup>97</sup> In this view abstaining is like casting a ballot that gives half a vote for and half a vote against the proposition—the net effect of which is a wash. This impression is consistent with the view that abstention indicates indifference. Others view abstention as a non-vote, as something that just isn't relevant to the decision at all. This is the view taken by *Robert's Rules of Order*, which states that an abstention in a situation with a relative quota has “absolutely no effect” on the outcome of the vote.<sup>98</sup> While this is a slightly different formulation, it too is consonant with the prevailing view that abstentions are often used to register something akin to indifference.

With a relative quota, the number of votes required to win varies with the number of votes cast; thus, with relative quotas, the effect of a voter's decision to abstain is twofold. First, it removes the voter's potential

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<sup>95</sup> See *id.* at 389–91.

<sup>96</sup> See Braham & Steffen, *supra* note 7, at 334; see also FELSENTHAL & MACHOVER, *supra* note 7, at 279–83. As we shall see below, this is not quite true in cases where the relative quota is set at one hundred percent, or unanimity. In those cases, an abstention would normally have the same function as a “yes” vote.

<sup>97</sup> See, e.g., Freixas & Zwicker, *supra* note 7, at 401.

<sup>98</sup> See *Frequently Asked Questions: Question 6*, THE OFFICIAL ROBERT'S RULES OF ORDER WEB SITE, <http://www.robertsrules.com/faq.html> (last visited Nov. 1, 2010).

support for, or opposition to, the proposition. Second, and more importantly, it reduces the number of votes necessary to pass the proposition. What this second effect means is that the abstainer's potential support or opposition to the proposition is very often not removed in equal measure—fifty-fifty, as it were—but instead removed in proportion to the quota. In other words, as Sreejith Das recently proved, *abstaining has the same effect as casting a vote in favor of the proposition weighted at the level of the quota*.<sup>99</sup> Some examples will make this point clear.

### 3. Examples

#### a. Abstention with a Relative Quota of Unanimity

This unexpected power of abstention is most disconcerting where the quota is highest, and the highest possible quota is a unanimity requirement. Take, for example, a body of 10 voters with such a quota. If all 10 voters cast a ballot, then the number of votes required for passage is 10. But, because this is a relative quota, that number changes with abstentions. If 1 voter abstains, the number of votes required for passage is 9; if 2 abstain, the number is 8; and so on. So what does this mean about the effect of abstaining in this situation?

Quite simply, it means that an abstention is the equivalent to casting a full ballot in favor of the proposition. One can abstain or one can vote 100% for the proposition—the effect on the outcome is exactly the same. This is a far cry from registering indifference, which would presumably apportion one's voting power equally between the alternatives. Such an apportionment—indeed, any apportionment of the voting power of abstaining members *against* the proposition—would mean that the proposal failed. For even if 9 voted in favor of the proposition, the single abstention, treated as a fifty-fifty vote, would mean 9.5 votes in favor, short of the original required 10. Thus, an abstaining member, in effect, votes most strongly in favor of a proposition in the very case where the voting procedure is designed to make passage the most difficult.

#### b. Abstention with a Relative Quota of Two-Thirds

A two-thirds majority is required for many important legislative decisions. In the most well-known example, Congress may override a presidential veto only upon a two-thirds vote of both the Senate and House of Representatives.<sup>100</sup> Congress is required to meet the same quota when proposing constitutional amendments<sup>101</sup> and, in the Senate's case, ratifying treaties<sup>102</sup> and convicting a president, vice president, or other civil officer

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<sup>99</sup> See Das, *Abstaining*, *supra* note 93, at 3–4; Das, *Voting Probabilities*, *supra* note 93.

<sup>100</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>101</sup> *Id.* art. V.

<sup>102</sup> *Id.* art. II, § 2, cl. 2.



in an impeachment proceeding.<sup>103</sup> Some state legislatures often have similar requirements for important decisions. In all of these situations, the electoral bodies wish to make change more difficult, and thus the higher decision threshold ensures that something closer to consensus must be in place in order to achieve it. That an abstention in such situations actually functions as a vote loaded in favor of change is quite surprising.

Take a simple example of a body with 9 voters and a 2/3 relative quota. If all members vote, 6 votes are required for approval. If 3 members abstain, only 4 votes are required for approval (2/3 of the remaining 6 voters). What this means, though, is that, by abstaining, the three non-voting members cast a vote weighted 2/3 in favor of the proposition. Had their abstentions only counted as fifty-fifty for and against the proposition, the total voting weights in a close case would only add up to 5 1/2 (4 full votes and 3 half votes for the proposition), short of the original requirement of 6. By abstaining, they ended up casting the equivalent of a 2/3 vote in favor of the proposition. Once again, their abstentions had the effect of casting a weighted vote in favor of the proposition at the level of the quota.

Something very similar to this recently occurred in the vote for Director General of the International Atomic Energy Agency ("IAEA"). The IAEA, which reports to the United Nations General Assembly and the Security Council, is an independent agency established to promote the peaceful use of nuclear energy and discourage its use for military purposes.<sup>104</sup> The Board of Governors is one of the agency's two policy-making bodies; among other things, it elects the IAEA's Director General for a four-year term.<sup>105</sup> In 2008, Director General Mohamed ElBaradei signaled that he would not seek a fourth term, thus setting up what became a most interesting election for the next Director General.<sup>106</sup>

The Board of Governors is a 35 member body with a 2/3 relative quota for election of Director General.<sup>107</sup> In a series of votes, Japan's Yukira Amano received 23 votes to South Africa's Abdul Samad Minty's 12 votes, just short of the quota of 24 (23 1/3 rounded up).<sup>108</sup> The logjam was broken in the final vote when one of Minty's supporters abstained, which reduced the quota to 23 (22 2/3 rounded up) and produced Amano's victory.<sup>109</sup> The abstention had the effect of casting a 2/3 weighted vote in

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<sup>103</sup> *Id.* art. I, § 3, cl. 6.

<sup>104</sup> See INT'L ATOMIC ENERGY AGENCY, STATUTE OF THE IAEA, arts. I, III(B)(4)–(5) [hereinafter IAEA], available at [http://www.iaea.org/About/statute\\_text.html](http://www.iaea.org/About/statute_text.html) (last visited Nov. 1, 2010).

<sup>105</sup> *Id.* arts. V–VI.

<sup>106</sup> See *Atomic Agency Leader to Leave Office Next Year*, N.Y. TIMES, Sept. 11, 2008, at A10.

<sup>107</sup> See IAEA, *supra* note 104, arts. VI–VII; Sharon Otterman & Alan Cowell, *Atomic Agency's New Chief Favors Strict Policy on Iran*, N.Y. TIMES, July 3, 2009, at A12.

<sup>108</sup> See Alan Cowell, *Atomic Agency Examines Candidates to Replace ElBaradei*, N.Y. TIMES, May 27, 2009, available at <http://www.nytimes.com/2009/05/27/world/27atomic.html>.

<sup>109</sup> See Otterman & Cowell, *supra* note 107.

favor of the leader, Amano—and it lowered the barrier enough to produce a victory for Amano in the absence of any additional support.

The IAEA election, however, doesn't demonstrate the phenomenon in question quite as crisply as the example with 9 members, a  $2/3$  quota, and 3 abstentions. Had the abstainer's vote been distributed fifty-fifty, Amano still would have met the quota, since he would have  $23 \frac{1}{2}$  votes to Minty's  $11 \frac{1}{2}$ , which is above the original quota of  $23 \frac{1}{3}$ . But it does demonstrate how abstentions with a relative quota can lead to unexpected results by lowering the number of votes necessary to win. It also leads us to a slight variation on the example that makes the point a bit sharper.

Imagine, for example that after the series of votes with a 23 to 12 deadlock, a weary Amano supporter approaches a Minty supporter and makes the following pitch: "On the next vote, instead of casting ballots for our favored candidates, and canceling each other out once again, let's both abstain in order to protest this ridiculously long election process." The Minty supporter agrees. But, to his surprise and dismay, even though none of the other members changed their votes, Amano is elected Director General. What happened?

What happened is that the power of abstention was on full display. By abstaining, the two voters did not merely cancel each other out as they would have if abstentions had the effect of casting a fifty-fifty vote. Split fifty-fifty, the effective vote would have been the same 23 to 12 tally, and the outcome would not have changed because neither candidate would have met the original quota of  $23 \frac{1}{3}$  votes. But, because of the  $2/3$  quota, the simultaneous abstentions actually had the effect of casting two votes weighted at  $2/3$  in favor of the leading candidate, Amano, and two votes weighted  $1/3$  in favor of the trailing candidate, Minty. Amano, therefore, effectively ends up with  $23 \frac{1}{3}$  of the 35 votes, just meeting the original quota. As it played out, the two abstentions meant that Amano captured 22 of the 33 votes cast, which met (exactly) the relative quota of  $2/3$ . Whether described as a weighted vote or as a reduction in the quota with an uneven effect on the candidates, the result is the same. The abstentions, then, were anything but an expression of protest designed to be neutral as between the candidates. Instead, they had the effect of casting weighted votes in favor of the leading candidate.

The Minty supporter would have been well-advised to "pair" his single abstention with those of *two* Amano supporters in order to achieve their desired outcome of not affecting the result. Indeed, this appears to be the practice in the U.S. Senate when voting on a matter that requires a two-thirds majority, such as treaty ratification. Congressional practice has long allowed pairing, a practice in which absent members agree to be recorded

on opposite sides of the issue.<sup>110</sup> The paired votes are not counted in the vote total, but may be reported in the record to assure constituents that the absence of their representatives did not affect the outcome of the vote. On a matter requiring a simple majority, votes could be paired off one-to-one with no effect on the outcome.<sup>111</sup> But where a two-thirds majority is required, such a pairing would effectively result in a weighted vote being cast in favor of ratification. For that reason, the Senate appears to “pair” off votes in the ratio of two votes in favor to one against, a rare instance of the power of abstention being built into practice.<sup>112</sup>

Failing to pair off votes two-to-one in a two-thirds quota situation, and simply pairing votes one-to-one, would result in casting votes in favor of the proposition. Indeed, Terry Radtke has described how one such misguided pairing occurred in the Wisconsin Assembly, and ended up being critical in a two-thirds vote to override a gubernatorial veto.<sup>113</sup> And, of course, the effect of a single, *unpaired* abstention in this situation is still the equivalent of a two-thirds vote in favor of ratification, not an expression of indifference.

### c. Abstention with a Relative Majority Quota

With a relative majority quota, the effective weight of an abstention comes closer to the fifty-fifty expression of indifference. This should not come as a great surprise given what we now know about the relationship between the quota and the effects of abstention. The precise effective weight of an abstention, however, depends upon how the majority quota is defined.

In some cases, a majority quota is defined as 50% of those casting a vote plus one vote. That formulation, which is rightly rejected by many democratic institutions,<sup>114</sup> produces a relative quota that starts out quite high with smaller electorates and approaches (but, importantly, never reaches) 50% as the electorate grows larger. The effective weight of an abstention is, again, equal to the quota. Thus, the weight of an abstention goes as follows with the number of voters:

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<sup>110</sup> See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 543–45 (1989).

<sup>111</sup> See *infra* Part III.B.3.c.

<sup>112</sup> See, e.g., C.P. Trussell, *Senate Approves 4 Peace Treaties, Rejecting Delay*, N.Y. TIMES, June 6, 1947, at 1 (describing how Senators in favor of ratification of a treaty were “paired” against two Senators who opposed ratification).

<sup>113</sup> See Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934–1956*, 81 MARQ. L. REV. 1001, 1013 (1998). After pairing off eight sets of two votes (which did not count), the Wisconsin Assembly voted 51 to 25 to override the governor’s veto with a two-thirds majority. Had the paired votes counted, the vote would have been 59 to 33, short of the required two-thirds majority. *Id.*

<sup>114</sup> The “50% + 1” rule produces unanticipated results with an odd number of voters. For example, with 3 voters, the rule produces a quota of 2.5, meaning that a proposal that received 2 out of the 3 votes would fall short of the quota and fail to pass.

Number of Voters	Votes to Pass (50% + 1)	Quota/Abstention Weight
2	2	100%
3	2.5	83%
4	3	75%
5	3.5	70%
10	6	60%
15	8.5	57%
20	11	55%
25	13.5	54%
30	16	53%
50	26	52%
100	51	51%
1000	501	50.1%
10,000	5001	50.01%

Under this definition of a majority quota, then, abstaining is equivalent to casting a vote weighted in favor of the proposition. The exact weight of the effective vote varies with the size of the electorate from 100% to slightly more than 50%. But it never quite becomes a fifty-fifty proposition.

Most institutions, though, define their majority quota most simply as “more than half.” When a majority quota is relative, an abstention effectively counts as a vote weighted “more than half” in favor of the proposition. But, unlike the “50% + 1” formulation, “more than half” approaches the limit of 50% regardless of the size of the electorate. For this reason, the weight of an abstention is effectively *at* that 50% limit. Put another way, it is impossible to devise an example where counting an abstention as a vote weighted “more than half” generates a different outcome than counting the abstention as a vote simply weighted as “half.” That is, in practice, the effective weight of an abstention is the fifty-fifty proposition that most expect it to be.

#### d. Abstention with a Relative Quota of One-Fifth

While democratic institutions usually keep their decision thresholds above 50%, there are some voting procedures that require something less than majority support.<sup>115</sup> Take, for example, the United States

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<sup>115</sup> In some well-known instances, such minority voting thresholds come in the form of an absolute quota. For example, the National Labor Relations Board requires employees who want a union election to make a showing of interest equal to thirty percent of the members of the proposed bargaining unit. NATIONAL LABOR RELATIONS BOARD, PROCEDURES GUIDE, <http://www.nlr.gov/>

constitutional requirement that one-fifth of those present may demand a roll call vote in either house of Congress.<sup>116</sup> If a member of Congress is *present* and abstains on such a demand, then the effect of the abstention is to vote wholly against the roll call vote—the abstention functions as it would with an absolute quota requirement. On the other hand, if a member abstains by being absent from the chambers, the effect of the abstention is like it is in a relative quota situation: it functions as a vote in favor of the demand weighted at the level of the quota.

But where, as here, the quota is less than a majority, a vote in favor of the demand at the level of the quota is actually a weighted vote *against* the proposition. On a demand for a roll call vote, for example, a member of Congress who abstains (by being absent) effectively casts a vote 20% in favor of having a roll call vote . . . and 80% against. Staying away from the legislative chambers in such a situation may be intended to express something like indifference, but, yet again, the actual effect of the abstention is to cast a weighted vote, this time strongly against the demand for a roll call vote. And, paradoxically enough, an abstaining member effectively votes against a demand for a roll call vote when the one-fifth voting threshold is designed to make such a demand relatively easy to accomplish.

#### 4. *Implications*

In many cases, abstentions have a surprising effect upon outcomes. The baseline expectation is that an abstention expresses indifference by either having no influence on the outcome or by being the equivalent to spreading one's voting power equally among the alternatives. This, however, is often not the case. In situations with absolute quotas, an abstention is equivalent to a full vote against the proposition. With relative quotas, an abstention functions as a weighted vote in favor or against the proposition, the precise weight determined by the level of the quota. With a relative majority quota defined simply as "more than half," this doesn't end up being much of a problem. But other relative quotas have the perverse effect of making an abstention equivalent to casting a vote weighted in favor of a proposition where the quota is set to make change more difficult (more than half), and of casting a vote weighted against a proposition where the quota is set to facilitate passage (less than half).

The full implications of the perverse effects of abstentions are beyond the scope of this Article. Generally speaking, however, the gap between perception and reality regarding the impact of abstention on outcomes may be bridged in a couple of different ways—by changing the perception or

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publications/procedures\_guide.htm (last visited Nov. 1, 2010). Similarly, the U.S. Supreme Court requires four votes for a grant of certiorari. These absolute quotas are not the subject of this section.

<sup>116</sup> U.S. CONST. art I, § 5, cl. 3.

changing the reality. Changing the perception would involve educating voters and other decision-makers about the potential effect of withholding their votes. This is not as much of an issue when dealing with absolute quotas, because most voters in such situations recognize that withholding their vote is the functional equivalent of casting a vote against the proposition. Relative quotas, though, are another story. While voters correctly assume that an abstention in the face of a simple majority quota is a fifty-fifty proposition, they are often wildly wrong about the effect of withholding their votes at almost every other quota level. The effect of abstaining in such situations is counterintuitive—voting procedures with supermajority requirements, designed to resist change, count abstentions as weighted votes in favor of change; voting procedures with quotas at less than a majority, designed to facilitate passage, count abstentions as weighted votes against passage. While abstentions are thought to express indifference, abstaining with a relative supermajority quota may, instead, tip the balance in favor of passage, and thus have an effect that is anything but indifferent with respect to the outcome. Those who design decision procedures, and the voters who use them, need to be aware of the actual impact of withholding votes.

Changing the reality of how abstentions are counted is also a possibility. The most straightforward way to do so would be to adopt procedures that count abstentions as equally splitting the weight of one's potential vote among the alternatives. This would ensure that a potential voter's indifference—whether honest, feigned in favor of some other value, or forced by a conflict of interest—is appropriately weighted in the outcome. This would allow us to avoid the kind of anomalous situations that occur, for example, at the intersection of supermajority requirements and conflict-of-interest rules. It makes absolutely no sense for a voter with a conflict of interest in a matter that requires supermajority approval to effectively cast a weighted vote in favor of his own position. A simple adjustment of the way abstentions are weighted in the outcome would align the perceived and actual effect of withholding your vote.

In any event, adjustments to the perception or reality of abstention need to be sensitive to the particular voting situation at hand. With few exceptions, large elections use simple majority quotas, and thus are not normally subject to this particular feature of abstention. Smaller democratic institutions, however, are much more likely to use supermajority or minority voting requirements. And these smaller institutions may involve voters with a wide range of experience and sophistication. Professional legislators, for example, can usually do a good job figuring out the precise effects of their decisions to abstain;<sup>117</sup> if

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<sup>117</sup> *But see supra* note 112, and accompanying text.

anything, we may worry that any deviation from existing rules would just provide additional fodder for strategic manipulation. The less sophisticated voters that populate a wide range of public and private boards and committees, however, are much more likely to be caught off guard by the effect of an abstention on an outcome. Thus it is in these situations that the role of abstentions in outcomes should be examined most carefully.

#### IV. CONCLUSION

Shortly before he died, Jeremy Bentham, one of the principal architects of utilitarianism, directed that his body be preserved in order to inspire future generations.<sup>118</sup> While his “auto icon” is normally kept on public display at the University College London, it is occasionally wheeled into the meetings of the College Council, where it is listed as “present but not voting.”<sup>119</sup> The joke trades on the well-settled expectation that abstentions have no effect on outcomes. But we now know that abstentions affect democratic outcomes in real and unexpected ways. Being “present but not voting” may very well have the effect of casting a weighted vote in favor or against a particular proposal before the council, and Bentham’s influence on modern affairs of the University College London may unexpectedly extend beyond the persuasive power of his philosophical writings.

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<sup>118</sup> See MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 56 (2009).

<sup>119</sup> See *id.* at 57.